IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Record No. 22,755

ROSALIE RIGGINS,

Appellant

v.

MARGARET K. RIGGINS, Executrix of the Estate of LESLIE E. RIGGINS, Deceased,

Appellee

Appeal from the United States District Court for the District of Nevada

REPLY BRIEF OF APPELLANT

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The appellee cites no federal case, which holds that federal jurisdiction is lacking if a State statute of limitations will reduce the claim below the jurisdictional amount. The cases in appellee's Brief are distinguishable on their facts and holdings, and each case in appellee's Brief will be discussed herein.

There are two federal cases expressly holding that the application of the statute of limitations will not impair federal jurisdiction, when the amount claimed in the Complaint exceeds the jurisdictional amount. These cases are *Griffin* v. *Smith*, 256 F. Supp. 746 (N.D. Okla. 1966), cited in appellant's

Brief at page 4, and *Upton* v. *McLaughlin,* 105 U.S. 640, 26 L.Ed. 1197 (1881).

The sole Nevada case relied upon by appellee, decided in 1900, discussed a statute differing in wording from the present statute. To assist the Court on appeal, each of the cases in appellee's Brief will be discussed according to the four (4) points listed in appellee's Brief. Each case will have the abbreviation "Br.—," indicating the page where the case is discussed in appellee's Brief.

Point One: In *North American Transportation and Trading Company* v. *Morrison,* 178 U.S. 262, 44 L.Ed. 1061 (1900) (Br. 6), there were eight causes of action for damages against a common carrier for breach of contract for failure to transport the plaintiff and seven other passengers to their destination in Dawson City from Seattle, Washington. There was no evidence in the record as to the citizenship of the seven passengers, who had assigned their claims to the plaintiff. The plaintiff claimed a number of items of damages, among which was the amount of wages or earnings he could have made in Dawson City, if the common carrier had fulfilled its contract. The Court held that the common carrier was not liable for such damages as a matter of law, which reduced the amount below the jurisdictional amount.

In *Vance* v. *Vandercook Co.,* 170 U.S. 468, 42 L.Ed. 1111 (1893) (Br. 6), which was a suit to recover possession of certain personal property, or its value, plus punitive damages, the Court held that under the law of South Carolina, consequential damages

cannot be recovered in an action of trover. The damages claimed, omitting the consequential damages, were less than the jurisdictional amount.

In *KVOS* v. *Associated Press*, 299 U.S. 269, 81 L.Ed. 183 (1936) (Br. 7), the Court held that the amount in controversy was the damage threatened to a business by the acts, and not the value of the business.

In *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 80 L.Ed. 1135 (1935) (Br. 7), which was a suit to enjoin the enforcement of an Indiana statute subjecting a business to regulations, the Court held that the amount in controversy was the value of the right to be free from regulation. There was no allegation that the regulation would curtail business and cause a loss.

In *North Pacific S.S. Lines* v. *Soley*, 257 U.S. 216, 66 L.Ed. 203 (1921) (Br. 7), which was a suit to enjoin the execution of an award under a California compensation act, the total liability due the injured party was less than the jurisdictional amount.

In *Gray* v. *Occidental Life Co.*, 387 F. 2d 935 (CCA 3rd 1967) (Br. 7), which was an action under disability policy, the Court held that the claim for punitive damages was frivolous as only Two Thousand Two Hundred Forty-two Dollars ($2,242.00) had accrued in damages at the time of the filing of the Complaint.

In *Spires* v. *North American Acceptance Corp.*, 383 F.2d 745 (CCA 5th, 1967) (Br. 7), the Court held

that under South Carolina law, the Complaint stated no cause of action for punitive damages.

In *Ringsby Truck Lines* v. *Beardsley,* 331 F.2d 14 (CCA 8th, 1964) (Br. 7), the Court held that under Colorado law, punitive damages cannot be recovered for rescission of a fraudulently induced transaction.

In *Batter* v. *Williams,* 316 F.2d 540 (CCA 5th, 1963) (Br. 8), an attorney alleged that he was due Five Thousand Two Hundred Eighty Dollars ($5,280.00) for services rendered, and an additional sum of Ten Thousand Dollars ($10,000.00) if he had not been discharged. The Court held that under Florida law, an attorney who is discharged by a client can only recover for services actually rendered.

In *White* v. *North American Accident Co.,* 316 F.2d 5 (CCA 10th, 1963) (Br. 8), the sum of Six Thousand Dollars ($6,000.00) only was involved under a health and accident insurance policy.

In *Turner* v. *Wilson Lines,* 242 F.2d 414 (CCA 1st, 1957) (Br. 8), there was no diversity of citizenship. An employee of a salvaging company died from injuries on a ship being salvaged in a Massachusetts harbor. Before his death, he suffered pain lasting eight (8) hours of moderate duration. The Court held that the District Court did not abuse its findings that the pain was not worth Three Thousand Dollars ($3,000.00).

In *Giordano* v. *Radio Corp. of America,* 183 F.2d 558, (CCA 3rd, 1950) (Br. 8), which was a suit to enjoin an employer from proceeding further on the

charges in a decision of expulsion from the Union, there was no proof that the plaintiff, if expelled from the local union, would lose Three Thousand Dollars ($3,000.00).

In *Hughes* v. *Encyclopedia Brit*, 199 F.2d 295 (CCA 7th, 1952) (Br. 8), which was an action by former employees against an employer for benefits under a pension plan, the Court held not a true class action, as the claim of no individual exceeded Three Thousand Dollars ($3,000.00).

In *Odell* v. *Humble Oil Co.*, 201 F.2d 123, (CCA 10th, 1953) (Br. 8), which was an action by some discharged employees against an employer for wrongful discharge, the Court held that the recovery of each employee was less than Three Thousand Dollars $3,000.00).

In *Parmelee* v. *Ackerman*, 252 F.2d 721, (CCA 6th, 1958), (Br. 8), the Court held that under Ohio law, damages for emotional distress for breach of contract cannot be recovered.

In *Nixon* v. *Loyal Order of Moose*, 285 F.2d 250, (CCA 4th, 1960) (Br. 8), which was an action by an architect for his fee, the architect had sent a statement that the sum of Two Thousand Nine Hundred Sixty Dollars ($2,960.00) was due.

In *McKoy, Inc.* v. *Schonwald*, 341 F.2d 737, (CCA 10th, 1965), (Br. 8), which was a suit to quiet title, the District Court heard evidence and found that mineral interests were worth Fifty Dollars ($50.00) per acre for a twenty-acre tract.

In *Herrick* v. *Sayler,* 245 F.2d 171 (CCA 7th, 1957) (Br. 9), the Court held that under Indiana law, damages for wrongful death are limited to medical, hospital and funeral expenses plus One Thousand Dollars ($1,000.00).

In *F. & S. Const. Co.* v. *Jensen,* 337 F.2d 160, (CCA 10th, 1964) (Br. 9), the District Court found that the plaintiff's allegation in the Complaint of the amount in controversy was not made in good faith. It awarded damages of Five Thousand Dollars ($5,000.-00) to each plaintiff, who had purchased homes from the vendors and sued the vendors for damages. The cost price of each house was slightly in excess of Ten Thuosand Dollars ($10,000.00).

In *Quinault Tribe of Indians* v. *Gallagher,* 368 F.2d 648, (CCA 9th, 1966) (Br. 10), the complaint alleged no amount in controversy. The Court held that the tribe of Indians could not claim as damages the value of law enforcement.

In *Southern Pacific Co.* v. *McAdoo,* 82 F.2d 121 (CCA 9th, 1936) (Br. 10), a removal case, the plaintiff alleged that the bond in controversy, which the Court was asked to construe, had a par value of One Thousand Dollars ($1,000.00).

In *Yoder* v. *Assiniboine and Sioux Tribes,* 339 F.2d 360, (CCA 9th, 1964) (Br. 10), the Court held that the matter in controversy was the right to be free from a regulation of a Montana commission.

In *Electro Therapy Prod.* v. *Strong,* 84 F.2d 766 (CCA 9th, 1936) (Br. 10), there was no proof that

the patents exceeded Three Thousand Dollars ($3,000.00) in value.

In *Canadian Indemnity Co.* v. *Republic Co.*, 222 F.2d 601, (CCA 9th, 1955) (Br. 10), which was a suit to construe an automobile liability policy, the Complaint alleged that a motorcycle was damaged, but did not allege anyone had been injured.

In *Commercial Casualty Co.* v. *Fowles*, 154 F.2d 884 (CCA 9th, 1946) (Br. 10), which was a suit to construe the rights of the parties under an accident policy, the Court held that future benefits under the policy could not be considered in determining the amount in controversy.

In *City of Forsyth* v. *Mt. States Power*, 127 F.2d 583 (CCA 9th, 1942) (Br. 11), which was an action for injunctive relief, there was no allegation showing the value of the rights.

Point Two: In *Jones* v. *Downing*, 25 Nev. 399, 60 P. 833 (1900) (Br. 11), the statute read: "No claim shall be allowed by the executor or administrator or the district judge which is barred by the statute of limitations at the time of the death of the person whose death is being administered." The Court held that the Amended Complaint showed on its face that the cause of action accrued more than six (6) years before the death of decedent.

In *Reay* v. *Heazelton*, 60 P. 977 (1900) (Br. 11), a judgment was entered in 1886 against a person who died in 1892. The action was filed in 1894. The California statute of limitations is not stated verbatim in the opinion.

In *Fontana Land Co.* v. *Laughlin,* 250 P. 669 (Cal. S.Ct. 1926) (Br. 12), the statute read: "No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations."

In *Bryant* v. *Superior Ct.,* 61 P.2d 483 (DCA 1936) (Br. 12), an order was entered by the Trial Court vacating certain orders which had approved a claim against the estate made more than two years prior to the vacating order. A petition was filed to annul the vacating order, and a Demurrer to said petition was sustained.

In *Hurlimann* v. *Bank of America,* 297 P.2d 682 (DCA Cal. 1956) (Br. 12), the statute required all claims for damages for physical injuries must be filed or presented to the estate within the time limited in the notice to creditors. The Court held that the statute included a cause of action for an injured person, who had not discovered the tort.

In *Barclay* v. *Blackington,* 59 P. 834 (Cal. S.Ct. 1899) (Br. 12), there was a four-year statute of limitations, and suit was filed on a note more than four years after the note became due.

In *In re Smith's Estate,* 264 P.2d 638 (DCA Cal. 1953) (Br. 12), the notice of the estate required claims by creditors to be presented not later than a designated time and the disputed claim was filed more than six months later.

In *In re Cocanougher's Estate,* 375 P.2d 1014 (Mont. S.Ct. 1962) (Br. 12), a suit was filed against

the Executors of an estate to account for the proceeds from the sale of cattle sold by decedent fourteen years subsequent to the death of plaintiff's decedent.

In *Ricker* v. *Ricker*, 270 P.2d 150 (1954) (Br. 13), there was a six-year statute of limitations. The loan was made in 1919 payable on demand. Five years later, there was an oral agreement that the borrower could pay whenever he got on his feet. The claim was presented in 1953.

In *Ellis* v. *Cauhaupe*, 260 P.2d 309 (1953) (Br. 14), there was a ten-year statute of limitations. The written contract accrued in 1937, but the action was filed in 1951.

In *Blas* v. *Talabera*, 318 F.2d 617 (CCA 9th, 1963) (Br. 14), the buyers sued the seller for specific performance of a contract to convey land. The contract was destroyed during World War II. The buyer was in possession and claimed he paid the purchase price. The Court held that the statute of limitations did not apply, as there was no proof of the date on which the statute of limitations began to run.

Point Three: All of the cases cited in appellee's Brief under Point Three are also cited in Point One and will not be repeated.

Point Four: In *Mitchell* v. *Maurer*, 293 U.S. 237, 79 L.Ed. 338 (1934) (Br. 18), there was no diversity of citizenship.

In *Page* v. *Wright*, 116 F.2d 449 (CCA 7th, 1940) (Br. 18), the Court held that defendant was

entitled to file an amended answer challenging diversity of citizenship.

In *Carr* v. *Beverly Hills Corporation,* 237 F.2d 323, (CCA 9th, 1956) (Br. 18), there was no diversity of citizenship.

In *Royalty Service Corp.* v. *Los Angeles,* 98 F.2d 551, (CCA 9th, 1938) (Br. 18), which was a suit to enjoin the enforcement of a tax statute, the Court held that the amount in controversy was the amount of tax due from the plaintiff.

In *Minnis* v. *Southern Pac. Co.,* 98 F.2d 913, (CCA 9th, 1938) (Br. 18), there was no diversity of citizenship.

In *Kaufman* v. *Liberty Ins. Co.,* 245 F.2d 918, (CCA 3rd, 1957) (Br. 18), the record in the lower Court did not establish that the amount claimed exceeded Three Thousand Dollars ($3,000.00) in a declaratory judgment action to construe a liability policy.

In *Armstrong* v. *New La Paz Gold Mining Co.,* 107 F.2d 453, (CCA 9th, 1939) (Br. 20), the Court sustained jurisdiction, even though judgment was for an amount less than the jurisdictional amount.

In *Kissick Construction Co.* v. *First National Bank,* 46 F. Supp. 869 (Br. 20), jurisdiction was maintained although dismissal of the second cause of action placed the remaining balance less than the jurisdictional amount.

In *Griffin* v. *Smith*, 256 F. Supp. 746 (Br. 21), the facts are almost identical to the facts in the present case. The complaint was based on arrearage in support under a foreign judgment. Defendant's motion to dismiss, based upon the statute of limitations, claimed that the balance would be less than the jurisdictional amount of Ten Thousand Dollars ($10,000.00), if the statute of limitations was upheld. The Court rejected the motion to dismiss. The quotation from the case is found at page 4 of appellant's Brief.

In *Anderson-Thompson, Inc.* v. *Logan Grain Co.*, 238 F.2d 598 (CCA 10th, 1956) (Br. 21), the judgment was for an amount less than the jurisdictional amount, but the Court held that it had jurisdiction.

In *Faias* v. *Superior Ct.*, 133 Cal. App. 525, 24 P.2d 567 (1933) (Br. 22), the holding of the Court was that the statute prohibiting the waiver of the statute of limitations by an executor, administrator, or Superior Court Judge, did not apply where some part of the claim was not barred by the statute of limitations. This holding would indicate that the application of the statute of limitations prohibiting a waiver is not automatic, nor is it applicable to every case. At 24 P.2d 568, the Court said:

> "The statute provides that no claim which is barred by the statute shall be allowed or approved (Probate Code Sec. 708); but it is not contended here that the whole claim was barred, as a portion at least had accrued within five years immediately preceding decedent's death; and when the Superior Court sitting in matters of probate has jurisdiction of the subject-matter

of a case, it has the power to hear and determine in the mode provided by law all questions of law and fact the determination of which is ancillary to a proper judgment (Burris v. Kennedy, 108 Cal. 331, 41 P.458), and although the allowance of a claim may be erroneous (Estate of Aldersley, 174 Cal. 366, 163 P. 206). The question is one which the Court is empowered to decide, and its jurisdiction is not limited to the rendition of a correct decision."

In *Re Lucas,* 144 P.2d 340 (Cal. S.Ct., 1943) (Br. 23), the California Court again held that the statute prohibiting an administrator, executor, or Superior Court Judge, to waive the statute of limitations does not apply, where there was some doubt as to whether the statute of limitations applied, and where litigation would be required to determine the applicability of the statute of limitations, the Court holding that a public administrator acting in good faith could compromise the action.

In *Lewis* v. *Neblett,* 311 P.2d 489 (Cal. S.Ct., 1957) (Br. 23), the Court based its decision that the California statute of limitations did not apply on two grounds, to-wit: (1) that the administrator had extended the time in writing for the trial to commence; (2) that the plaintiff was unable to read or write, or figure, and relied on decedent for advice, and that discovery of the defraud of decedent did not occur until some time before the running of the statute of limitations.

Some of the cases cited in appellee's Brief favor the appellant, rather than the appellee.

In *Jaconski* v. *Avisun*, 359 F.2d 931, (CCA 3rd, 1966) (Br. 9), the District Court dismissed the action for personal injuries on the ground that the amount in controversy did not exceed Ten Thousand Dollars ($10,000.00). Although the special damages did not exceed Four Hundred Dollars ($400.00), the Court of Appeals reversed.

In *Food Fair Stores* v. *Food Fair*, 177 F.2d 177 (CCA 1st 1959) (Br. 10), which was a suit to enjoin the use of the words "Food Fair," the Court held that the amount in controversy exceeded the jurisdictional amount of Three Thousand Dollars ($3,000.00), as the plaintiff could show damages in excess of that amount.

In *Santiesteban* v. *Goodyear Tire Co.*, 306 F.2d 9, (CCA 5th, 1962) (Br. 10), the District Court dismissed the case that sought damages for invasion of privacy for lack of jurisdictional amount. The defendant had removed tires from the rims of plaintiff's car from the lot of a country club where he worked. The Court of Appeals reversed the District Court, holding that punitive damages could be recovered by the plaintiff.

In *Davenport* v. *Mutual Benefit*, 325 F.2d 785 (1963) (Br. 10, 15), which was an action for compensatory and punitive damages for fraud and deceit under Oregon law, the District Court dismissed the case for lack of jurisdiction, and this Court on appeal reversed, holding at page 787, to-wit:

> "Here the judge dismissed because in his opinion it appeared from the proof that the

plaintiff was not entitled to recover the jurisdictional amount. In such a case, where the complaint asserts a claim in the jurisdictional amount, the action should not be dismissed unless the proof not only shows that the plaintiff cannot recover that amount, but also shows this with such certainty as to indicate a lack of good faith on the part of the plaintiff in bringing the action in the federal court. St. Paul Mercury Indemnity Co. v. Red Cab Co. (1938) 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845; McDonald v. Patton, 4th Cir., 240 F.2d 424, 426; Matthiesen v. Northwestern Mutual Insurance Company, 5 Cir. 1961, 286 F.2d 775."

In *McDonald* v. *Patton,* 240 F.2d 424 (CCA 4th, 1957) (Br. 9, 15), the District Court dismissed the case for lack of jurisdiction as to the amount in controversy. The Court of Appeals, construing North Carolina law, reversed. In a lucid opinion as to the amount in controversy, Judge Sobeloff, wrote:

"It is the firmly established general rule of the federal courts that the plaintiff's claim is the measure of the amount in controversy and determines the question of jurisdiction; and it is indisputably the law that if the ultimate recovery is for less than the amount claimed, this is immaterial on the question of jurisdiction. Scott v. Donald, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 632. From early days, the broad sweep of the rule has been subject to a qualification namely, that the plaintiff's claim must appear to be made in good faith. Bowman v. Chicago &

Northwestern Railway Co., 115 U.S. 611, 6 S.Ct. 192, 29 L.Ed. 502, Schunk v. Moline, Milburn & Stoddart Co., 147 U.S. 500, 505, 13 S.Ct. 416, 37 L.Ed. 255. Where it is plain that there is a mere pretense as to the amount in dispute, the amount of the claim will not avail to create jurisdiction, but where the plaintiff makes his claim in obvious good faith, it is sufficient for jurisdictional purposes; and this is so even where it is apparent on the face of the claim that the defendant has a valid defense. Upton v. McLaughlin, 105 U.S. 640, 26 L.Ed. 1197; Schunk v. Moline, Milburn & Stoddart Co., supra; Smithers v. Smith, 204 U.S. 632, 27 S.Ct. 297, 51 L.Ed. 656. In the last cited case, the Supreme Court said, 204 U.S. at page 644, 27 S.Ct. at page 300, that when a plaintiff in good faith asserts a claim in an amount within the jurisdiction of the Court, the Judge is forbidden 'to interpose and try a sufficient part of the controversy between the parties to satisfy himself that the plaintiff ought to recover less than the jurisdictional amount, and to conclude, therefore, that the real controversy between the parties is concerning a subject of less than the jurisdictional value.'"

"In applying this test, it has been further recognized that while good faith is a salient factor, it alone does not control; for if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount, the case will be dismissed for want of jurisdiction. Such is the doctrine laid down in St. Paul Mercury

Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845. However, the legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim. If the right of recovery is uncertain, the doubt should be resolved, for jurisdictional purposes, in favor of the subjective good faith of the plaintiff."

"In certain of the older cases, a somewhat different statement of the rule is found. It was formerly said that 'if, from the nature of the case as stated in the pleadings, there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach.' Vance v. W. A. Vandercook Co., 170 U.S. 468, 18 S.Ct. 645, 647, 42 L.Ed. 1111. The possible difference between the two formulations was the subject of some discusion in Calhoun v. Kentucky-West Virginia Gas Co., 6 Cir., 166 F.2d 530, but the difference may be more apparent than real. Cf. Scott v. Donald, supra, 165 U.S. at page 89, 17 S.Ct. 265, and Barry v. Edmunds, 116 U.S. 550, 559, 6 S.Ct. 501, 29 L.Ed. 729. However this may be, if the older version was different, it yields to the one more recently declared in the St. Paul-Mercury case."

In *Horton* v. *Liberty Mut. Ins. Co.*, 367 U.S. 348, 6 L.Ed.2nd 890 (1961) (Br. 9), also cited at page 3 of appellant's Brief, the District Court dismissed the Complaint for lack of jurisdictional amount. The Court of Appeals reversed, holding that the District Court did have jurisdiction, and the Supreme Court

affirmed. An injured employee was awarded the sum of One Thousand Fifty Dollars ($1,050.00) from a Texas compensation commission. The compensation carrier filed a Complaint in Federal Court alleging the amount of the award and also alleging that the injured party was claiming the sum of Fourteen Thousand Thirty-five Dollars ($14,035.00), and prayed that no amount should be awarded. The injured employee filed a compulsory counterclaim for the sum of Fourteen Thousand Thirty-five Dollars ($14,035.00).

In *St. Paul Mercury, Inc.* v. *Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1937) (Br. 9), from which this Court in *Armstrong* v. *New La Paz Gold Mining Co.*, 107 F.2d 453, 455 (1939), quoted with approval, an insured sued an insurer for breach of contract in State Court, and the case was reversed. The District Court awarded judgment of Eleven Hundred Sixty-two and 98/100 Dollars ($1,162.98). The Court of Appeals reversed for lack of jurisdictional amount. The Supreme Court, in holding that the District Court had jurisdiction, stated at 303 U.S. 288, ". . . The inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim."

In *Smithers* v. *Smith*, 204 U.S. 632, 27 S.Ct. 297, 51 L.Ed. 656 (1907) (Br. 9), also found at page 4 of appellant's Brief, in holding that the District Court had jurisdiction in an action for damages for ouster of the plaintiff from possession of the land and for

recovery of the land, the Court relied upon the case of *Schunk* v. *Moline Co.,* 147 U.S. 500, 504, 13 S.Ct. 416, 37 L.Ed. 255 (1893), where the Court said:

> "Suppose an action were brought on a non-negotiable note for $2500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the Circuit Court would have jurisdiction There would be presented a claim to recover the $2500, and whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the Court?"

At 147 U.S. 505, the Court discussed and relied upon the case of *Upton* v. *McLaughlin,* 105 U.S. 640, 644, 26 L.Ed. 1197 (1881), which held that the defense of the statute of limitations does not oust the District Court from jurisdiction, to-wit:

> ". . . A case much in point is that of Upton v. McLaughlin, 105 U.S. 640, 644. That was a suit brought by an assignee in bankruptcy more than two years after the cause of action accrued, and it was claimed that the trial court had no jurisdiction—because of a provision of

section 5057 of the Revised Statutes of the United States, that 'no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.' But it was held that the court did have jurisdiction, and this, notwithstanding sections 55 and 57 of the Code of Civil Procedure of Wyoming, the Territory in which that litigation took place, authorized a defendant to demur to the petition when it appeared upon its face either that the court had no jurisdiction or that the petition did not state facts sufficient to constitute a cause of action, and also provided that these objections were not waived by not taking them by either demurrer or answer. Speaking for the Court, Mr. Justice Blatchford said: 'It is contended that a petition which shows upon its face that the cause of action is barred by a statute of limitation, is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defence of a bar by a statute of limitation to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so

barred, and thus as not stating facts sufficient to constitute a cause of action.' In other words, it was held that although there was a perfect defence apparent upon the face of the petition, yet the court had jurisdiction—i.e., the right to hear and determine; and further, in that case, that the defence was not available when suggested for the first time in the appellate court. So, here, the Circuit Court had jurisdiction, because the amount claimed was over two thousand dollars; and although it appeared upon face of the petition that a part of the claim was not yet due, still the court had jurisdiction—the right to hear and determine whether this matter constituted a good defence to any part of the amount claimed."

CONCLUSION

It is respectfully submitted that the cases cited in appellee's Brief fail to sustain the holding of the District Court that jurisdiction was lacking by reason of the availability of a defense of the Nevada statute of limitations.

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